75-1071

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MURRAY BOGATIN,

Petitioner,

against

~~THE PEOPLE OF THE STATE OF~~ NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	Page
Opinions Below	1
Citations to Opinions Below	2
Statement of Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statute Involved	
Article V	4
Article VI	4
Article XIV, Section 1	4
Section 215.51 of New York State Penal Law	5
Statement of the Case	5
Reasons for Granting the Writ	
I. The Decision of the New York Courts is in Conflict with Long Established Constitutional and Decisional Law	13
II. The Decision of the New York Courts is in Conflict with the Spirit and Holding of the Cases of Lefkowitz v. Newsome, 420 U.S. 283, and Blackledge v. Perry, 417 U.S. 21.	15

Table of Contents

	Page
Conclusion	20
Appendix "A"	21
Appendix "B"	22
Appendix "C"	23

CASES CITED

Miranda v. Arizona, 384 U.S. 436 ...	14
Escobedo v. Illinois, 378 U.S. 478 .	14
Gideon v. Wainwright, 372 U.S. 335 .	14
People v. Ianniello, 21 N.Y.2d 418, 325	15
Albrecht v. United States, 273 U.S. 1	15,16
Weeks v. United States, 216 F. 292, 235 U.S. 697	15
Lefkowitz v. Newsome, 420 U.S. 283 .	15,19
Blackledge v. Perry, 417 U.S. 21 ...	15
People v. Scott, 3 N.Y.2d 148	16,18

Cases Cited

	Page
People v. Maggio, 16 A.D.2d 820	16,19
People v. Baranello, 24 A.D.2d 637 .	17,19
People v. Ortiz, ___ N.Y.2d ___	18
People v. Johnson, ___ N.Y.2d ___ ..	18
People v. Gorgone, 47 A.D.2d 347 ...	19

UNITED STATES CONSTITUTION

Fifth Amendment	2,3,4
Fourteenth Amendment	3,4
Sixth Amendment	3,4

STATUTES CITED

28 U.S.C. Sec. 1257(3)	2

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THE PEOPLE OF THE STATE OF NEW YORK,

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To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Murray Bogatin, prays that a writ of certiorari to review the order of the Court of Appeals of the State of New York which denied leave to appeal to said court from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed a judgment of the County Court, County of Suffolk, dated November 21, 1973,

convicting petitioner of the crime of attempted criminal contempt by refusal to testify before a grand jury after having been granted immunity, and imposing a fine in the sum of $1,000.

CITATIONS TO OPINIONS BELOW

The New York State Court of Appeals in denying leave to appeal from the affirmance by the Appellate Division rendered no opinion. A copy of the decree, dated October 30, 1975, denying leave is printed in the Appendix, infra, page 21.

The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, affirming the judgment of conviction of the County Court, County of Suffolk, is reported as 48 A.D.2d 674 (N.Y. 1975), and is printed in the Appendix, infra, page 22.

STATEMENT OF JURISDICTION

The decree of the Court of Appeals of the State of New York, denying leave to appeal to that Court, which petitioner seeks to have this Court review, was entered on October 30, 1975. The statutory provision believed to confer on this Court jurisdiction to review the decree in question is 28 U.S.C. § 1257(3). Petitioner also claims that his rights under the Fifth and

Fourteenth Amendments to the United States Constitution were violated when he was held to answer an insufficient indictment based upon insufficient evidence before the Grand Jury. Petitioner also claims that his right under the Sixth Amendment to have the assistance of counsel was violated. Petitioner finally claims that he did not waive his constitutional rights to due process of law and the equal protection of the laws under the Fourteenth Amendment by entering a voluntary plea of guilty to the crime of attempted criminal contempt.

QUESTIONS PRESENTED

Whether a defendant is denied due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution when he is held and compelled to answer an indictment of a Grand Jury where the indictment does not state a crime and where the evidence before the Grand Jury is not legally sufficient to establish the crime charged in the indictment.

Whether a witness is denied his right to have the assistance of counsel in violation of the Sixth Amendment when he is compelled to testify before a State Grand Jury after refusal of his request for the assistance of counsel.

Whether a defendant is denied due pro-

cess of law in violation of the Fourteenth Amendment when he is compelled to waive his objections to the jurisdiction of the local court over the alleged crime and over his person upon the entry of a voluntary plea of guilty to a reduced charge of said crime.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendments to Constitution of the United States:

Article V — "No person shall be held to answer for a...crime, unless on a presentment or indictment of a Grand Jury...nor shall any person...be deprived of life, liberty or property, without due process of law..."

Article VI — "In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation...against him...and to have the Assistance of Counsel for his defense."

Article XIV, Section 1 — "...No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person...the equal protection of the laws."

Section 215.51 of New York State Penal Law

"A person is guilty of criminal contempt of a Grand Jury where, after having been granted immunity, he refuses to be sworn as a witness before a Grand Jury, or who, after being sworn as such a witness, refuses to answer any legal and proper interrogatory."

STATEMENT OF THE CASE

This petition seeks to have this Court review a decree of the Court of Appeals of the State of New York which refused to review the affirmance by the Appellate Division of the Supreme Court of the State of New York of a judgment of the County Court, County of Suffolk, dated November 21, 1973, convicting petitioner, upon his voluntary plea, of the crime of attempted criminal contempt in violation of Section 215.51 of

the New York State Penal Law for which petitioner was fined the sum of $1,000.

However, prior to petitioner's arrest and indictment thereunder, the Suffolk County Grand Jury was investigating five individuals suspected of engaging in criminal usurious activities. In this connection petitioner, an attorney, was called before said body as a witness.

Petitioner throughout his appearance before the Grand Jury requested the right to seek assistance of counsel, but was denied each time. Two of these requests are set forth as follows:

> "...since there has been a horrendous statement of fact by (prosecutor) I would seek adjournment to seek the aid of counsel."[1]

When the prosecutor indicated an adjournment would inconvenience the Grand Jury, the court denied the request as follows:

> "...Mr. Bogatin...due to your expertise...I would ask you to go back and answer..."[2]

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1. See pages 63-64 of Grand Jury minutes.
2. Id., page 64.

The court's refusal to inconvenience the Grand Jury is further noticed from the following at page 67 of the testimony:

> "I don't believe Mr. Bogatin is in need of any counsel. I'm not going to adjourn the matter any further. I'm directing you to go back to the Grand Jury and proceed."

At that point petitioner further explained his desire for counsel as follows:

> "...I'm aware of the fact that I am an attorney...(but) here I am an individual, be I an attorney or otherwise, I feel, under the circumstances, I wish to be represented. I do have that right, I do request it. If Your Honor denies it..."
>
> THE COURT: "I have already denied it."

At a later point petitioner advised the court that he had complied with instructions. However, when the court disagreed, petitioner again at page 120 requested counsel as follows:

> "And under the circumstances, I certainly request the opportunity to seek legal counsel to see if I can be advised to see whether he's considered that I've complied and indicate what course of action to take, and even though I am an attorney, I've been

here in my individual capacity and as such, I feel that I am entitled to representation if I desire. Perhaps the matter would be clearer to me if I had an attorney who would be able to explain the situation to me. I think I have complied. I think I have answered -- if I'm wrong in my -- some attorney can indicate so to me; I then would come back."

After repeated refusal by the court petitioner again seriously requested the assistance of counsel as is set forth on pages 122-123:

"If Your Honor feels I should go back again, I would certainly request the opportunity of consulting with counsel at this point and since I've been here three times and in my thinking, I've complied with all the instructions of the court, it's not my intention not to comply with the directions. If it was my intention at the start, I wouldn't have been here to start with."

On page 123 petitioner found it necessary to remind the court that the need to seek counsel was "not an outrageous request."

Finally, the court being adamant in its refusal directed petitioner to show cause the following morning at 9:30 A.M. in open court why he should not be punished for contempt. Yet this time the court reminded petitioner to be sure to appear with an attorney.[3]

After hearing of the contempt charge, petitioner replied as follows at page 125:

"The only way I can comply -- I can't without knowing what my legal position is, without consulting with an attorney for independent advice. I think I should be given the same opportunity as a layman would. The mere fact that I am a lawyer should not, in any way, deprive me of the right."

In conclusion petitioner stated to the court at page 126 as follows:

"You're depriving me of any right to consult with counsel."

Upon the return date of the contempt citation the contempt proceedings were dismissed upon the court's own action.[4]

Subsequently, petitioner was indicted for two counts of perjury and one count of

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3. Id., page 123.

4. See pages 281-292 of Record on Appeal to Appellate Division of Supreme Court of the State of New York (1972).

criminal contempt pursuant to Section 215.51 of the New York State Penal Law. The indictment was based solely upon the testimony given by petitioner as a witness in his appearance before the aforesaid Grand Jury. No other matter is contained or alleged in the indictment.

Thereafter, petitioner before trial made timely motion in the trial court to dismiss the indictment on the ground the court lacked jurisdiction over the subject matter because the indictment did not state a crime and also because the evidence before the Grand Jury was not legally sufficient to establish the crime charged in the indictment.

The trial court granted the motion to dismiss the criminal contempt count of the indictment and held as follows:

> "The Court has scrutinized both the grand jury minutes and the minutes of the proceedings which transpired before Judge Lundberg, and after a careful reading thereof, one must conclude that ...the defendant...after being appropriately admonished by the court, and instructed as to the propriety and pertinency of the questions put to him before the grand jury, he did answer all of the questions as directed by the court."[5]

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5. See pages 9-10, id.

The District Attorney then appealed the decision to the Appellate Division of the Supreme Court of the State of New York, and that court reversed and reinstated the criminal contempt charge. Petitioner then made application for leave to appeal from said reversal to the Court of Appeals of the State of New York which was denied by then Associate Judge Charles H. Breitel (now Chief Judge). However, upon oral argument, Judge Breitel appeared to indicate he, too, believed the criminal contempt charge was legally insufficient, but he denied leave to appeal on the ground that he would not burden the time of the Court of Appeals with an appeal from what he considered only an intermediate order. He also stated that such order could be reviewed ultimately if there would be a judgment of conviction.

Previously, the Grand Jury jointly indicted the aforesaid five individuals under investigation for usury. These men were tried before County Court Judge Gordon Lipetz and at that trial petitioner represented one of the individual defendants.

Judge Lipetz had a reputation for being a favorite judge of the prosecutor's office[6] and thereafter petitioner's trial

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6. On April 23, 1971, Newsday (a major daily N.Y. publication) at page 20, attributed the following to a Suffolk

was maneuvered before Judge Lipetz. When petitioner's several motions to have the case removed to another judge for trial were denied, petitioner entered a voluntary plea of guilty to the crime of attempted criminal contempt as a misdemeanor at which time the other counts of the indictment were dismissed. For sentence the court imposed a fine in the sum of $1,000.

Although petitioner knowingly plead guilty, he did not admit any wrongdoing.[7] He took the plea to avoid what he believed would be an unfair trial before Judge Lipetz resulting in felony convictions and automatic disbarment. He took the plea knowing that the court lacked jurisdiction over the indictment and that an appeal still could be prosecuted from the voluntary plea in order to protect his constitutional rights. After all he also remembered that Court of Appeals Judge Breitel had stated he would be able to appeal to the Court of Appeals after a conviction.

Petitioner then appealed the conviction to the Appellate division of the Supreme Court of the State of New York asserting as

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County Ass't. Dist. Atty:
"We have only one judge we like to put cases before and that's Lipetz."

7. See change of plea stenographic minutes.

error that he was deprived of his Federal constitutional rights when he was convicted of a crime over which the County Court had no jurisdiction because the indictment did not charge a crime and was based upon insufficient evidence and also that he was not permitted to have the assistance of counsel at his Grand Jury appearance. The Appellate Division passed upon these Federal questions by holding that petitioner's voluntary plea waived all right to appeal and thereupon affirmed the conviction as free of error.[8]

Associate Judge Sol Wachtler thereafter denied petitioner's application for leave to appeal to the Court of Appeals of the State of New York, without opinion, thereby indicating that the voluntary plea waived all right to appeal and thus rejected petitioner's Federal arguments. At that point state judicial remedies were exhausted.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NEW YORK COURTS IS IN CONFLICT WITH LONG ESTABLISHED CONSTITUTIONAL AND DECISIONAL LAW.

The constitutional right to the assistance of counsel in a criminal case is most

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8. See Appendix, infra, page 23.

elemental and needs little exhortation. The cases are legion, such as, Miranda v. Arizona, 384 U.S. 436; Escobedo v. Illinois, 378 U.S. 478; and Gideon v. Wainwright, 372 U.S. 335.

The court below committed serious constitutional error when it refused to extend the right to counsel for Grand Jury appearances.

Although petitioner is an attorney, he was still entitled to the right of representation by counsel in connection with the appearance before the Grand Jury as herein. John Mitchell, the former Attorney General of the United States, in his appearances before a Grand Jury was represented by counsel, even though he was the highest legal officer of the country.

The recent Watergate experiences before the various Federal committees clearly demonstrate the proper need for legal counsel for all witnesses. Not a sole lawyer-witness was without counsel in attendance.

The Court of Appeals of the State of New York has recognized the right of a non-lawyer witness before a Grand Jury to enjoy the assistance of counsel. Chief Judge Breitel recently held as follows:

> "Whenever a witness demands to see his lawyer for counselling concerning his

> legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so." People v. Ianniello, 21 N.Y.2d 418, 325.

It is also well established that a court does not have jurisdiction over an indictment which fails to state or charge a crime or which is based on insufficient Grand Jury evidence. See Albrecht v. United States, 273 U.S. 1, and Weeks v. United States, 216 F. 292, 235 U.S. 697.

II. THE DECISION OF THE NEW YORK COURTS IS IN CONFLICT WITH THE SPIRIT AND HOLDING OF THE CASES OF LEFKOWITZ v. NEWSOME, 420 U.S. 283, AND BLACKLEDGE v. PERRY, 417 U.S. 21.

The courts below have held, in effect, that the voluntary plea entered by petitioner waived all rights. The courts did not distinguish between jurisdictional rights, non-jurisdictional rights, constitutional rights (existing or future), statutory rights, decisional rights, substantial rights, etc.

Petitioner respectfully claims that he had jurisdictional and due process rights which were not waived by the voluntary plea.

An indictment which fails to charge a crime is jurisdictionally defective and must

be dismissed even after a voluntary plea is interposed. Such an indictment is void ab initio, it never becomes valid.

See Albrecht v. United States, 273 U.S. 1; People v. Scott, 3 N.Y.2d 148; and People v. Maggio, 16 A.D.2d 820, rev'd on other grounds, 12 N.Y.2d 789.

In prior cases the New York courts have held that a voluntary plea does not waive jurisdictional defects.

In the case of People v. Scott, 3 N.Y.2d 148, defendant entered a voluntary plea of guilty to operation of a motor vehicle while intoxicated. The Appellate Division affirmed the conviction but the Court of Appeals reversed, holding as follows on page 152:

> "However, objections to the jurisdiction of the court are not waived, nor is the objection that the (indictment) does not state a crime."

Likewise in the case of People v. Maggio, 16 A.D.2d 820, defendant entered a voluntary plea to the crime of sodomy. However, the Appellate Division reversed the conviction holding as follows:

> "Defendant's plea of guilty...does not preclude him from thereafter challenging such count on the ground that it does not charge a crime, since the plea admits only the facts as alleged and does

> not create a punishable offense when none is in fact charged against the defendant...In our opinion, the first count is insufficient as matter of law...Accordingly defendant's plea is a nullity, the judgment must be reversed and count one of the indictment dismissed, since it is also insufficient..."

Although the Maggio decision was reversed by the Court of Appeals (12 N.Y.2d 789), it was reversed on other grounds and the cited portion herein was not disturbed on review.

It is also salutary to look at the case of People v. Baranello (New York), 24 A.D.2d 637, wherein defendant entered a voluntary plea of guilty to the crime of omission of duty by a public officer. The plea, incidentally, was taken in the same County Court as herein.

However, the Appellate Division reversed the conviction in holding as follows on page 638:

> "We find that the indictment on its face fails to state a crime. Such objection is not waived by a plea of guilty...In addition...the evidence submitted to the Grand Jury was legally insufficient..."

While it must be conceded by petitioner that a great number of rights are waived by the entry of a voluntary plea of guilt, the

courts below herein took the erroneous view that all rights are waived. This view, of course, is wrong and actually violated petitioner's constitutional rights.

Jurisdictional defects are never waived. If jurisdiction is absent, it remains absent forever.

The Appellate Division ignored all of petitioner's constitutional arguments by holding that his voluntary plea "waived all nonjurisdictional defects". The Court of Appeals compounded this error by denying leave to appeal.

The holding below herein that the voluntary plea waived all issues is also contrary to prior established New York case law.

The New York courts have always recognized that certain substantial issues such as jurisdiction, due process and substantial final rights are not waived by voluntary pleas. See the following cases:

1. People v. Scott, 3 N.Y.2d 148.

2. People v. Ortiz, ___ N.Y.2d ___, decided Feb. 19, 1975.

3. People v. Johnson, ___ N.Y.2d ___, decided Dec. 14, 1975.

4. People v. Gorgone, 47 A.D.2d 347.

5. People v. Baranello, 24 A.D.2d 637.

6. People v. Maggio, 16 A.D.2d 820, rev'd on other grounds.

Thus, by its own decisional law, New York has granted to defendants the right to appeal jurisdictional defects after a voluntary plea of guilt.

The recent decision of this court in Lefkowitz v. Newsome, 420 U.S. 283, clearly states that where New York by statute permits an appeal after a guilty plea, then Federal remedies may be invoked if an appeal is refused by the state.

This court held as follows at page 293:

> "Accordingly, we hold that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal...proceeding."

Thus, it is respectfully claimed that decisional law should and must be treated the same as statutory law so that petition-

er's writ should be granted.

In another case this court also held that a voluntary plea of guilt did not preclude a defendant from raising his constitutional claims. See Blackledge v. Perry, 417 U.S. 21.

CONCLUSION

This court should grant the writ to settle the question that a voluntary plea does not waive jurisdiction defects and that attorney-witnesses are entitled to have the assistance of counsel at Grand Jury interrogations.

Respectfully submitted,

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APPENDIX "A"

"12. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. MURRAY BOGATIN, Appellant--Appeal by defendant from a judgment of the County Court, Suffolk County, rendered November 21, 1973, convicting him of attempted criminal contempt, upon his plea of guilty, and sentencing him to a fine of $1,000. Judgment affirmed. By his guilty plea defendant waived all nonjurisdictional defects (People v La Ruffa, 40 AD2d 1022, aff'd 34 NY2d 242; People v Schiskey, 39 AD2d 608). The other contentions raised by defendant have been considered and found to be without merit. Latham, Acting P.J., Christ, Munder and Shapiro, J.J., concur."

APPENDIX "B"

At a Term of the Appellate Division of the Supreme Court of the State of New York Second Judicial Department, held in Kings County on November 27, 1972

PRESENT, J. IRWIN SHAPIRO, Acting Presiding Justice

[redacted]
HON. JAMES D. HOPKINS
[redacted]
[redacted]
[redacted]
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
Associate Justices

The People, etc.,

Appellant,

v.

Murray Bogatin,

Respondent.

Order on Appeal from Order

In the above entitled cause, the above named The People, etc., plaintiff,

so much of

having appealed to this court from an order of the County Court, Suffolk

County dated January 11, 1972, as granted the branch of defendant's motion which was to dismiss the third count of the indictment (criminal contempt by refusal to testify before a Grand Jury after having been granted immunity [Penal Law, § 215.51]);

and the said appeal having been argued by Ira Harris Simon,

Esq., of counsel for the appellant, and submitted by Ernest J. Peace, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's

opinion and decision slip heretofore filed and made a part hereof, it is

insofar as

ORDERED that the order appealed from is hereby unanimously reversed, on the law, motion denied insofar as it was to dismiss the third count of the indictment and said count reinstated.

Enter:

IRVING N SELKIN

Clerk of the Appellate Division

BEST COPY AVAILABLE

APPENDIX "C"

State of New York
Court of Appeals

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against
MURRAY BOGATIN

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
October 30, 19 78

Associate Judge

*Description of Order: Judgment of County Court, Suffolk, November 21, 1973; affirmed by Appellate Division, Second Department, May 13, 1975.